Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1798

BLUE DIAMOND COAL COMPANY,
*Petitioner,*
v.

JENNIFER BOGGS, CAROL COMBS, GERALDINE COOTS, VERA GALLOWAY, LIBBY GIBBS, MADONNA GRIFFITH, DIANE MCKNIGHT, GERALDINE MCKNIGHT, PHYLLIS PEAVEY, VICKIE SCOTT, CELINDA SPARKMAN, ETHEL STURGILL, DEBBIE TURNER, REDA TURNER, and CHARLOTTE WIDNER, Administratrices of their Decedents and Individually,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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Respondents respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 590 F.2d 655. The Sixth Circuit denied a petition for rehearing and a suggestion for rehearing *en banc. Ibid.*

### QUESTIONS PRESENTED

1. Was it an abuse of discretion for the Sixth Circuit not to certify a question of Kentucky law to the Kentucky Supreme Court when first requested to do so in a petition for rehearing?

2. Under the Kentucky Workmen's Compensation Act, is Petitioner Blue Diamond Coal Company immune from tort liability for its negligence in causing the deaths of fifteen employees of its wholly-owned subsidiary corporation?

## STATEMENT OF THE CASE

Petitioner's lengthy petition notwithstanding, the issue decided by the Sixth Circuit involved a straightforward application of federal court interpretation of state law as mandated by this Court in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and its progeny. Manifestly, such a routine appellate action presents no issue worthy of this Court's full consideration.

Respondents, fifteen widows of coal miners killed in a mine disaster, sued Petitioner Blue Diamond alleging that Petitioner's negligence caused the fatal mine explosion. After Respondents completed their presentation of evidence at trial, the District Court granted summary judgment for Petitioner Blue Diamond, concluding that Blue Diamond was a "contractor" immune from tort liability under the Kentucky Workmen's Compensation statute.

Respondents appealed, disputing the interpretation of Kentucky law relied upon by the District Court. At no time prior to the decision by the Sixth Circuit did either Petitioner or Respondents suggest that the issue of Kentucky law should be certified to the Kentucky Supreme Court. It was only after the Sixth Circuit ruled adversely on Petitioner's claim that the Petitioner raised for the first time, in a petition for rehearing and suggestion for rehearing *en banc*, the issue of certification to the Kentucky Supreme Court. Not surprisingly, the Sixth Circuit denied this belated claim. Petitioner Blue Diamond now seeks to convert this routine exercise of appellate discretion into an issue that merits review by this Court. Petitioner's request should be denied not



only because it is belated but, more critically, because it raises no possible issue worthy of this Court's concern.

## REASONS WHY THE WRIT SHOULD BE DENIED

### I. The Decision of the Court of Appeals Not to Certify a Question of Kentucky Law to the Kentucky Supreme Court When First Requested to Do So in a Petition for Rehearing Does Not Warrant the Grant of Certiorari.

Petitioner Blue Diamond argues initially that certiorari should be granted because the Sixth Circuit declined, when asked by Blue Diamond for the first time in a petition for rehearing and suggestion for rehearing *en banc*, to certify a question of Kentucky law to the Kentucky Supreme Court. According to Blue Diamond, certification in this case was "mandatory" (Pet. 19-26), was "the only sensible alternative" (Pet. 26-29), and was "required by the decisions of this Court" (Pet. 29-35). But neither the general principles governing certification of questions to state courts nor the particular facts of this case required certification to the Kentucky Supreme Court.

In 1974, this Court clarified the governing principles regarding certification of questions to state courts by the lower federal courts:

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. *Its use in a given case rests in the sound discretion of the federal court. Lehman Brothers* v. *Schein*, 416 U.S. 386, 390-91 (1974) (emphasis added) (footnote omitted).

Since *Lehman Brothers* makes it clear that the decision whether to use an available certification procedure is

committed to the sound discretion of the federal court, the only question presented to this Court for review is whether the Sixth Circuit abused its discretion in denying the petition for rehearing and the suggestion for rehearing *en banc*.[1] That issue in itself does not warrant the grant of certiorari.

Moreover, the circumstances surrounding the Sixth Circuit's exercise of discretion in this matter firmly establish that its decision not to follow the certification procedure was sound and reasonable. To begin with, the Kentucky Supreme Court has agreed to answer only "questions of law" certified to it by federal courts. Petitioner Blue Diamond argues that certification was necessary here because "the federal judges who heard this case are evenly divided as to whether the present common law action is barred under Kentucky law." (Pet. 29.) But the various opinions in this case indicate that these federal judges differed as to a *factual question*; namely, the existence of a contract between Petitioner Blue Diamond and its wholly-owned subsidiary. District Judge Hermansdorfer found "a contract to exist between the parties," and Circuit Judge Peck's dissent states that he could find "no reason to hold [that] finding of fact . . .

[1] Petitioner attempts to demonstrate a conflict among the circuits justifying the grant of certiorari. Pet. at 35-41. The attempt is unsuccessful. Essentially, Petitioner simply demonstrates that other courts of apeals have on occasion exercised their discretion to certify questions to state courts. Yet, there is nothing in the opinion of the Sixth Circuit in this case that suggests that federal courts lack such discretion; the decision below simply evidences a decision not to certify in the circumstances of this matter. The absence of any real conflict on this point is established by Petitioner's own observation that "[t]he author of the majority opinion in fact referred to Kentucky's certification procedure with approval in *Union Light, Heat and Power Co.* v. *District Court*, 588 F.2d 543 (6th Cir. 1978) (argued October 31, 1978)." (Pet. 28-29.) Thus, the Sixth Circuit, like its sister circuits, recognizes that certification is well within the ambit of its discretion.



clearly erroneous."[2] (Pet. 16a.) The majority of the Sixth Circuit, on the other hand, concluded that "the relationship here is contractual [neither] *in fact* [nor] in theory." (Pet. 11a) (emphasis added). Since the federal judges differed as to a factual question, Petitioner Blue Diamond errs when it suggests that the Sixth Circuit "refused to allow the only court which could authoritatively resolve this deadlock to do so." (Pet. 29). Even if it desired to do so, the Sixth Circuit could not certify this question of fact to the Kentucky Supreme Court.

The reasonableness of the Sixth Circuit's decision not to pursue certification is underscored by the fact that Petitioner Blue Diamond waited until after the Sixth Circuit issued an adverse ruling before suggesting that the case was appropriate for certification, and then did so only in passing in a lengthy petition for rehearing and suggestion for rehearing *en banc*. During the seven month period from June 27, 1978—the date the Kentucky certification procedure was adopted—to January 23, 1979 —the date of the Sixth Circuit's adverse ruling—Petitioner Blue Diamond was content to have state law issues decided by the Sixth Circuit. Surely, the Sixth Circuit acted within the bounds of reasonableness when it declined to grant a request for certification that had inexplicably been delayed until after its ruling. Compliance with Blue Diamond's tardy request for certification would have given Blue Diamond two bites at the apple: here, Blue Diamond waited to determine whether the Sixth Circuit would rule in its favor, and, upon receipt of an unfavorable ruling, sought a second opportunity at suc-

[2] Judge Peck did not suggest in his dissent that there was an issue of law that should have been certified to the Kentucky Supreme Court.

cess in a different forum. Such tactics should be frowned upon rather than encouraged.[3]

**II. This Case Does Not Present a Substantial Issue of the Application of the Erie Doctrine.**

The second question identified by Petitioner Blue Diamond for review by this Court is whether the Sixth Circuit "disregarded" the *Erie* doctrine. But Petitioner itself plainly refutes such a claim. Even a cursory reading of its Petition demonstrates that Blue Diamond's claim is not that the Sixth Circuit disregarded state law with respect to substantive rights, but simply that the Sixth Circuit was "clearly wrong" in its interpretation and application of Kentucky law. (Pet. 42.) In each of the literally thousands of cases where federal courts are called on to decide issues of state law, an identical claim obviously could be raised. Such routine claims, of course, do not give rise to the kinds of "special and important reasons" that justify the grant of certiorari under Rule 19.

In any event, Petitioner Blue Diamond is wrong in its assertion that the Sixth Circuit erroneously interpreted state law. Petitioner identifies three respects in which the Sixth Circuit allegedly erred in its interpretation of state law. First, Blue Diamond claims that "the *majority opinion* erroneously concludes that courts *liberally construe the coverage provisions* of workmen's compensation acts but *narrowly construe the immunity provisions.*" (Pet. 42) (emphasis added). But as to this view of Kentucky law regarding statutory construction,

[3] Furthermore, the grant of Blue Diamond's tardy request for certification by the Sixth Circuit in February of 1979 would have been completely inconsistent with that court's order one year earlier scheduling this case for expedited hearing.



the Sixth Circuit panel was unanimous.[4] Indeed, both the majority and dissenting opinions cite a 1970 case in which the Sixth Circuit first observed this development in Kentucky case law. (Pet. 6a-7a, 15a, *citing Bryant* v. *Old Republic Insurance Co.*, 431 F.2d 1385 (6th Cir. 1970)).

Second, Blue Diamond claims that the Sixth Circuit erred in its conclusion that there was no contract between Blue Diamond and Scotia under the Kentucky statute. Here, the majority of the Sixth Circuit panel concluded that there was "no formal, integrated agreement, either written or oral." (Pet. 9a.) But the majority went on to observe that "[e]ven if we were willing to stretch the point and dispense with the need for an actual contract . . . we do not believe the relationship here is contractual either in fact or in theory." (Pet. 10a-11a.) Thus, the Sixth Circuit's holding in this regard rests in the alternative on the ground that the precise factual relationship between Blue Diamond and its subsidiary cannot be characterized as contractual. Judge Peck stated in his dissent that he would not have set aside the District Court's "finding of fact" in this regard (Pet. 16a), but surely this fact-specific issue does not warrant plenary review by this Court.

Finally, Blue Diamond claims that the Sixth Circuit erred in its conclusion that Blue Diamond was not an "employer" and thus immune from tort liability under the Kentucky Workmen's Compensation Act. (Pet. 47.) After expressly noting that the "Kentucky courts have not addressed the question of whether a multi-unit corporate enterprise should be viewed as a single 'employer'

[4] Circuit Judge Peck specifically stated: ". . . I am not in disagreement with the conclusion expressed in the majority opinion to the effect that the coverage provisions of Workmen's Compensation acts should be liberally construed, but that their immunity provisions should be narrowly construed." (Pet. 15a.)

for purposes of liability and benefits under the workmen's compensation statute," the Sixth Circuit proceeded to follow Kentucky "principles of corporation law which hold that separate corporate identities should not be disregarded." (Pet. 11a-12a). Application of those principles led the Sixth Circuit to reach what was plainly a reasonable assessment of how the Kentucky courts would rule on this issue. *Erie R. Co.* requires nothing more. *Commissioner of Internal Revenue* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967).

## CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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